No. 93-4

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,
v.
EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,
v.
CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL WOMEN'S LAW CENTER, WOMEN EMPLOYED, THE WOMEN'S LEGAL DEFENSE FUND, THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, THE CHICAGO AFRICAN-AMERICAN FIREFIGHTERS LEAGUE, THE CHICAGO COUNCIL OF LAWYERS, CHICAGO WOMEN IN TRADES, THE LATINO FIREFIGHTERS ASSOCIATION OF CHICAGO, AND THE NAACP CHICAGO SOUTH SIDE BRANCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner City of Chicago has consented to the filing of the brief. This motion is necessary because the respondents have denied consent.

The *amici,* national and local organizations whose members are active in efforts to protect the civil rights of people who historically have been victimized by dis-

crimination, have a strong interest in legal issues affecting equal employment opportunities and in rectifying past discrimination in this country through voluntary affirmative action by private employers and governmental entities.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Lawyers Committee") is a non-profit legal advocacy organization founded in 1969. Since its inception, the Lawyers' Committee has enlisted the *pro bono* services of many hundreds of attorneys from Chicago law firms in addressing a wide range of legal problems, including employment discrimination. The Lawyers' Committee has strong interest in seeing racial discrimination eliminated and, where appropriate, remedied with affirmative action efforts.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national non-profit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It has frequently represented plaintiffs and intervenors in employment discrimination matters raising affirmative action issues, and has appeared as an *amicus* in federal courts, including cases before this Court.

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make the goal of equal opportunity for women in the workplace a reality. The implementation of remedial efforts by employers to rectify prior discrimination is essential to this goal. Consequently, the Center has a deep and abiding interest in ensuring that voluntary and appropriate affirmative action plans are adequately protected under the law.

Women Employed is a national membership association of 2,000 working women based in Chicago. Since 1973,

the organization has assisted thousands of working women with sex discrimination problems, monitored the performance of equal opportunity enforcement agencies, and developed proposals for improving enforcement efforts. Women Employed has found affirmative action measures to be a necessary tool in remedying sex discrimination.

The Women's Legal Defense Fund ("WLDF") is a non-profit national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender.

The American Civil Liberties Union of Illinois ("ACLU") is a statewide, non-profit, nonparitsan organization of nearly 14,000 members. It is an affiliate of its national parent organization, the American Civil Liberties Union. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws.

The Chicago African-American Firefighters League was established in 1967 to improve the professional competency of firefighters and to promote justice for its membership. The League has been actively involved in employment discrimination litigation and the enforcement of consent decrees aimed at desegregation of the fire service. The League is concerned that the overly restrictive interpretation of the consent decree in this case will negatively affect strides achieved by minorities in the 1980s.

The Chicago Council of Lawyers ("Council") is a public interest bar association of more than 1,200 members.

It was founded in 1969 to work toward a system of justice that is fair to all. The Council evaluates state and federal judges, files briefs *amicus curiae* in cases affecting the public interest, authors publications to educate lawyers and the public at large about our legal system, and issues recommendations for improving the ways in which courts and government agencies operate.

Chicago Women in Trades ("CWIT") is an organization that assists tradeswomen and women seeking entry into nontraditional blue-collar employment. CWIT works to increase the number of women in the trades, and advocates for equal employment opportunities. CWIT has found affirmative action measures to be a necessary remedy for many women in nontraditional jobs who have long been victims of gender discrimination.

The Latino Firefighters Association of Chicago seeks to ensure that Latino firefighters are provided equal employment opportunities. The Association believes that measures taken to ameliorate prior discriminatory practices are a vital means for achieving equal employment, and therefore has a strong interest in the continued viability of legitimate affirmative action undertaken by employers.

The NAACP Chicago South Side Branch is a branch of the National Association for the Advancement of Colored People ("NAACP"), the nation's oldest and largest civil rights organization. The NAACP was established in 1909 to empower and protect African-Americans and other minorities under the Constitution through principles of equal justice under law. The NAACP has been instrumental in securing passage of all civil rights legislation in this century, and remains committed to the full enforcement of these laws.

This case is of great interest to *amici* because the decision of the United States Court of Appeals for the Seventh Circuit in *City of Chicago v. Billish*, 989 F.2d 890 (7th Cir. 1993) (en banc), seriously impairs an employer's ability to engage in voluntary remedial efforts to eradicate past discrimination. A decision, like the one

below, that increases the vulnerability of consent decrees and creates unrealistic evidentiary hurdles for employers seeking to implement necessary remedial measures will limit the employment opportunities available to women and non-whites in this country.

Many of the *amici* organizations have been litigating against employment discrimination for many decades, and seek to ensure that work forces, both public and private, end discriminatory practices and rectify prior discrimination. Voluntary affirmative action will be significantly impeded if employers must satisfy the rigid, extraordinary strictures established by the en banc Seventh Circuit in this case.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and because *amici*'s perspective may help illuminate the significant and disturbing implications of the court of appeals' decision, *amici* respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted,

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August 18, 1993

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	2
INTRODUCTION	2
ARGUMENT	4
I. EMPLOYERS WILL BE DISSUADED FROM VOLUNTARILY REMEDYING PRIOR DISCRIMINATION IF THEY CANNOT RELY ON STATISTICALLY SIGNIFICANT RACIAL DISPARITIES AS A BASIS FOR IMPLEMENTING REMEDIAL MEASURES	4
A. No Employer Should Be Forced To Admit Liability To Engage In Affirmative Action, Particularly Where The Employer Is A Governmental Entity With A Demonstrated Record Of Prior Discrimination	4
B. Evidence Of Statistically Significant Racial Disparities Should Not Be Disregarded Merely Because The Defendant Has Not Disproven All Possible Nondiscriminatory Explanations For Those Disparities	8
II. GOVERNMENTAL EMPLOYERS WILL BE DETERRED FROM SETTLING CIVIL RIGHTS CASES IF CONSENT DECREES ARE IRRELEVANT IN ASSESSING WHETHER AN EMPLOYER HAS A STRONG BASIS IN EVIDENCE FOR ENGAGING IN REMEDIAL EFFORTS TO RECTIFY PRIOR DISCRIMINATION	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	11
Castaneda v. Partida, 430 U.S. 482 (1976)	9
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	3, 5, 6, 10
Cygnar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989)	7
Hazelwood School Dist. v. United States, 433 U.S. 299 (1977)	5, 9
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987)	5, 6, 13
Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986)	6, 13, 14
Martin v. Wilks, 490 U.S. 755 (1989)	12
Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993)	5
Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992)	5
Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978)	14
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	10
St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993)	5
United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999 (6th Cir. 1992)	5
United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980)	2
United States v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976), *aff'd in part and rev'd in part*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977)	6, 9
United States v. Paradise, 480 U.S. 149 (1987)	15
United Steelworkers v. Weber, 443 U.S. 193 (1979)	6, 13
Walker v. City of Birmingham, 388 U.S. 307 (1967)	14

TABLE OF AUTHORITIES—Continued

Page

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 5, 10, 13, 14

Statutes and Legislative Materials

18 U.S.C. § 401 14

29 C.F.R. § 1607.3(B) (1991) 11

The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the House Comm. on Education and Labor and the Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights, 101st Cong., 2d Sess. 3

Other Authorities

Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. Ill. L. Rev. 579 (1983) 13

Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 897 13

Official Report of the Task Force on Affirmative Action—City of Chicago (Dec. 1985) 8

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THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.,
THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND,
THE NATIONAL WOMEN'S LAW CENTER,
WOMEN EMPLOYED,
THE WOMEN'S LEGAL DEFENSE FUND,
THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS,
THE CHICAGO AFRICAN-AMERICAN FIREFIGHTERS LEAGUE,
THE CHICAGO COUNCIL OF LAWYERS,
CHICAGO WOMEN IN TRADES,
THE LATINO FIREFIGHTERS ASSOCIATION OF CHICAGO, AND
THE NAACP CHICAGO SOUTH SIDE BRANCH
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

INTRODUCTION

In holding that the City of Chicago must go to trial to defend measures undertaken to remedy prior discrimination, the en banc Seventh Circuit, in a 5-4 decision, refused to consider critical evidence offered by the City. The court's stated rationales for disregarding the City's evidence—which included significant statistical racial disparities among the ranks in the Chicago Fire Department ("CFD") and a consent decree with the United States Department of Justice ("DOJ")—are contrary to the decisions of this Court and the law in other circuits. The decision below will create prohibitive obstacles for employers embarked on affirmative action as a remedy for prior discrimination and will dissuade others from even trying to foster inclusion of minorities and women in work forces from which they historically have been excluded.

Discrimination in fire and police departments, such as that documented on the part of the City of Chicago, is a deeply entrenched practice nationwide. A study by the United States Commission on Civil Rights in 1969, the very era in which the City's discriminatory policies were first challenged by the DOJ, revealed rampant discrimination by cities, particularly in fire and police departments: "Barriers to equal employment are greater in police and fire departments than in any other area of state and local government." *United States v. City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980) (quoting U.S. Commision on Civil Rights, "For all the people . . . By all the people," 119-20 (1969)). According to the study, fire and police departments engaged in exclusionary practices ranging from recruitment to on-the-job harassment:

> Negroes are not employed in significant numbers in police and fire departments. . . . Negro policemen and firemen hold almost no positions in the officer ranks. . . . Police and fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers. Minority group hostility to police and fire departments also deters recruitment, and this has not been overcome by the departments.

Id.

All public employers play a unique role in the eradication of discrimination. As the Mayor of Birmingham recognized in his testimony on the Civil Rights Act of 1990, "[e]radication of discrimination in the public sector is of special importance, both because discrimination in the public sector impugns a government's intent and ability to represent all citizens, and because elimination of discrimination in the public sector fosters the elimination of discrimination in the private sector." *The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the House Comm. on Education and Labor and the Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights*, 101st Cong., 2d Sess. 286-87 (statement of Richard Arrington, Jr.) (citing H.R. 92-238, 2 U.S. Code Cong. & Admin. News 2137, 2152-54, 2157-60 (1972) (legislative history of 1972 amendment that brought public employers within coverage of Title VII)). The decision below rebukes such efforts, by imposing standards that go well beyond those required by this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Seventh Circuit's decision undercuts the ability of all employers to engage in remedial efforts to ameliorate prior discrimination, and creates disincentives to settlement of employment discrimination litigation. Its effect

will be to discourage employers from voluntarily remedying prior discrimination. The majority opinion is a serious setback to civil rights organizations that have worked to vindicate the rights of people who historically have been harmed by discriminatory practices.

ARGUMENT

I. EMPLOYERS WILL BE DISSUADED FROM VOLUNTARILY REMEDYING PRIOR DISCRIMINATION IF THEY CANNOT RELY ON STATISTICALLY SIGNIFICANT RACIAL DISPARITIES AS A BASIS FOR IMPLEMENTING REMEDIAL MEASURES.

A public employer need not prove a case of intentional discrimination against itself in order to withstand constitutional scrutiny of its affirmative action efforts. Yet that is what the en banc Seventh Circuit's approach to statistical evidence effectively requires. The court refused even to consider relevant statistical evidence because it supposedly pertained to discrimination that was "non-actionable" under Title VII. Moreover, according to the court, the statistics provided no evidence of intentional discrimination, apparently because the employer did not refute every conceivable non-discriminatory explanation for its statistics through record evidence. This clearly is not required by *Croson,* in which this Court reaffirmed that statistical evidence such as that proffered by the City is a powerful indication of discrimination.

A. No Employer Should Be Forced To Admit Liability To Engage In Affirmative Action, Particularly Where The Employer Is A Governmental Entity With A Demonstrated Record Of Prior Discrimination.

The Seventh Circuit's approach forces employers seeking to comply with constitutional mandates to face an untenable choice: admit prior intentional discrimination or forgo all forms of voluntary affirmative action. In so

doing, the court turns on its head the principle that the plaintiff continues to bear the ultimate burden of persuading the court that the defendant's evidence does not support an inference of prior discrimination, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.* at 292-93 (O'Connor, J., concurring in part and concurring in judgment); *see also St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), by effectively shifting the burden of proof to the employer to prove its own intentional discrimination as the only permissible means to support a remedial purpose.

Employers rarely will admit that they have engaged in intentional discrimination. This is the very reason that statistical evidence is so essential. It has been used for years, with this Court's approval, to evaluate employment practices in the absence of direct proof of intentional discrimination. *See Croson*, 488 U.S. at 500-01 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977)); *id.* at 509.[1]

Moreover, no employer should have to prove a case against itself in order to engage in efforts to rectify prior discrimination. Indeed, this Court has disavowed such a requirement. *See Croson*, 488 U.S. at 500 (strong basis in evidence supporting remedial action may be shown by something "approaching a prima facie case of constitutional or statutory violation"); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment).[2] This Court has recognized that such a require-

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[1] Following *Croson*, numerous circuits likewise have reaffirmed the relevance of statistical evidence in determining the existence of a compelling purpose. *See, e.g., Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 725 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992).

[2] This Court has also expressly rejected such a requirement in the Title VII context. *See Johnson v. Transportation Agency,*

ment would have dangerous ramifications, particularly since a specific admission of past discrimination could expose governmental employers—and, as a result, taxpayers—to liability in damages. *See, e.g., Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 630 & n.8 (1987); *see also Local 93, Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. 501, 515 (1986).

The voluntary efforts undertaken by the government of a diverse city to incorporate residents who have long been victims of exclusionary policies and practices into its work force should not be stymied by unreasonable and unnecessary burdens.[3] *Croson* expressly contemplates affirmative action measures based on a factual predicate such as that established by the City in this case. *See* 488 U.S. at 509. The City of Chicago has an unfortunate history of employment discrimination against minorities. *See, e.g., United States v. City of Chicago,* 411 F. Supp. 218 (N.D. Ill. 1976) (Chicago Police Department guilty of race and sex discrimination in violation of Title VII), *aff'd in part and rev'd in part,* 549 F.2d 415 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977). This history, plus the City's statistical evidence, leaves no doubt that the City's remedial efforts were entirely appropriate. *Croson,* 488 U.S. at 509 ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.").

Santa Clara County, 480 U.S. 616, 630 & n.8 (1986); *see also United Steelworkers v. Weber,* 443 U.S. 193, 209 (1979); *id.* at 212 (to justify adoption of an affirmative action plan in that context, an employer need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part; rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories") (Blackmun, J., concurring).

[3] According to 1990 census figures, the City of Chicago's population is 37.9 percent white, 38.5 percent African-American, 19.6 percent Latino, and 3.8 percent other.

Although the en banc Seventh Circuit took "judicial notice" of cases involving allegations that the City engaged in reverse discrimination, *see* Pet. App. 10a (citing cases),[4] the court failed to acknowledge its own prior decisions in which the City was found to have discriminated against minorities, or studies of the City's hiring practices that establish a pattern of discrimination. A 1985 task force charged with analyzing prior discrimination by the City found "a history of exclusionary employment practices" against minorities and women, noting that hiring was "a closed system" and that promotions "were given on a preferential basis":

> The dominance of white males in higher paid job categories can be attributed to the closed personnel system utilized in the past. The application process was a closed system and in some cases, the Department of Personnel was bypassed completely. Recruitment of minorities and women was minimal at best. In addition, promotions were given on a preferential basis, and all employees were not given opportunities to apply and be considered for new positions. . . .
>
> The Task Force on Affirmative Action concludes that the personnel practices of the City of Chicago have had a negative effect on the opportunities of minorities and women for employment and advancement in the City's workforce. There is a history of exclusionary employment practices and underutilization of minorities and women in several of the occupational categories and departments within the City.

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[4] The majority suggests that the City of Chicago "under the Washington administration could hardly be thought insensitive to the interests of minority groups," but only one of the cases cited by the majority, *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989), contains any findings that the City engaged in discrimination against whites. In *Cygnar*, one official was found to have discriminated against whites in making certain personnel decisions in mid-1984. Surely that does not raise an issue of fact as to whether other officials—Commissioners Hoskins and Galante—discriminated against whites three years later.

> This indicates that minorities and women have been discriminated against and that equal employment opportunity has not been implemented and enforced.

Official Report of the Task Force on Affirmative Action —City of Chicago (Dec. 1985).

The CFD's failure to hire and promote minorities and women clearly calls into question its ability to effectively serve the community, particularly in a city as diverse as Chicago. Indeed, City Personnel Commissioner Hoskins acknowledged this as a relevant factor in the disputed promotions, noting that the CFD "is a community service organization which needs the trust and cooperation of the community it serves. This provides an additional reason why it is important to have a Fire Department that is integrated at all levels." Pet. App. 40a n.9. Unfortunately, the Seventh Circuit's opinion will dissuade public employers, such as the City of Chicago, from acting upon this recognized need to include all citizens in the work forces of entities charged with the public trust.

B. Evidence Of Statistically Significant Racial Disparities Should Not Be Disregarded Merely Because The Defendant Has Not Disproven All Possible Nondiscriminatory Explanations For Those Disparities.

The majority's willingness to cite cases alleging reverse discrimination while ignoring the backdrop of the City's prior discrimination is particularly troubling because the court engaged in speculation to refute the evidence proffered by the City to support its remedial efforts. When Commissioner Hoskins requested the affirmative action promotions at issue in June 1987, 11% of the engineers were minorities, compared to 29.2% of the firefighters, and 3.6% of the captains were minorities, compared to 13.6% of the lieutenants. *See* Pet. App. 96a-97a. The City's uncontradicted evidence established that the difference between the expected and actual percentage of minority engineers was 8.7 standard deviations, and that

the difference between the expected and actual percentage of minority captains was 3.96 standard deviations. *Id.* at 97a. These differences plainly were statistically significant. *See Hazelwood,* 433 U.S. at 309 n.14; *Castaneda v. Partida,* 430 U.S. 482, 496-97 n.17 (1976). The court dismissed this statistical evidence on the ground that the disparity could have been based on pre-1972 practices—which, since undertaken by a public employer, were not yet actionable under Title VII.[5]

The court's approach is perverse from a policy perspective and is contrary to the law. First, the mere fact that the perpetrator of discrimination happened to be a public, rather than private, employer whose actions prior to 1972 were not covered by Title VII should not affect its ability to remedy past discrimination. If prior discriminatory practices are the cause of an existing significant statistical disparity—regardless of whether those discriminatory practices had been within the compass of Title VII when they occurred—the employer should be permitted to remedy that disparity. Indeed, the Seventh Circuit has previously recognized that very principle. *See City of Chicago,* 549 F.2d at 436 ("[E]ven though Title VII did not become applicable to the City until 1972, the court had an obligation to correct the present consequences of discriminatory conduct that occurred before that date.").

Second, notwithstanding the Seventh Circuit's suggestions, *see* Pet. App. 13a, *Croson* does not indicate that

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[5] In wholly disregarding the City's statistical evidence, the Seventh Circuit also stated that there was "no evidence" that the City had engaged in intentional discrimination in violation of the Constitution prior to 1972. Pet. App. 13a. This reasoning is circular. As the City explains in its petition, this Court has held that statistical evidence is relevant to the determination of whether intentional discrimination has occurred. *See* Pet. 24-25. By rejecting the City's statistical evidence, the court precluded consideration of the very evidence that could help establish that the City's prior discriminatory actions were indeed intentional.

only discrimination that has been proven unlawful may be remedied. *See* 488 U.S. at 500; *see also Wygant*, 476 U.S. at 289-93 (O'Connor, J., concurring in part and concurring in judgment).[6] Statistics such as those proffered by the City, clearly reflecting unjustified exclusionary practices, may appropriately be used in establishing a strong basis for remedial action.

Given the court's avowed emphasis on so-called "actionable" discrimination, it is particularly troubling that the court gave short shrift to evidence pertaining to the 1985 engineer test that revealed a Title VII violation. The uncontroverted evidence established that the 1985 engineer test had an adverse impact on African-Americans and Latinos, and that the City was aware of this fact. *See* Pet. App. 46a. Moreover, the record contained expert evidence supporting the City's contention that the examination could not have been validated for use in strict rank order, thereby establishing that the City would not be able to prove a legitimate job-related justification for this adverse impact. *See* Pet. App. 99a; *id.* at 50a (citing Barrett Aff. ¶¶ 16, 17). Strict rank order use of this test with an adverse impact that could not be validated as job-related would certainly have constituted a violation of Title VII. In light of this, the City departed from strict rank order in making promotions.

In disregarding this evidence, the majority speculated—with no record support—that "an alternative possibility . . . is that the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order," Pet. App. 13a-14a, and that "[t]he city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to

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[6] Indeed, state and local governments have a compelling interest in ameliorating the effects of even entirely lawful, private discrimination that prevents disadvantaged groups from obtaining equal opportunities for economic and social advancements. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984).

practice reverse discrimination by departing from rank order fixed by nonbiased tests." *Id.* at 11a. The record is clear, however, that strict rank order use of the promotion list was no more valid than the mechanism selected by the City—and that the latter had less adverse impact. According to the *EEOC Uniform Guidelines on Employee Selection Procedures,* when there are two equally valid selection mechanisms, an employer is obligated to select the one with the less adverse impact on minorities. *See* 29 C.F.R. § 1607.3(B) (1991).[7] This requirement has been vital in increasing employment opportunities to members of traditionally disadvantaged groups, and its survival is of critical importance to the effective enforcement of the civil rights laws.

Blind to both the law and the facts by an unabashed hostility to the concept of affirmative action, *see, e.g.,* Pet. App. 2a-3a (cases "involve challenges to racial favoritism in promotions . . . ."); *id.* at 14a ("[t]here is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination . . . ."), the en banc Seventh Circuit adopted a dismissive approach to the evidence that impaired the City's ability to demonstrate the factual basis for its remedial efforts. Moreover, the court engaged in pure speculation that required the City to refute every conceivable nondiscriminatory rationale for its remedial actions. As an en banc opinion, *Billish* will be the law in the Seventh Circuit and will be persuasive authority in all circuits, despite its interlocutory nature. It establishes an unsettling precedent that places an unreasonable burden upon local governments and other employers seeking to implement legitimate remedial measures to rectify prior discrimination. Further review of the court's treatment of statistical evidence is therefore warranted.

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[7] Indeed, failure to use selection criteria with the least discriminatory impact may be evidence of pretext. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 436 (1975).

II. GOVERNMENTAL EMPLOYERS WILL BE DETERRED FROM SETTLING CIVIL RIGHTS CASES IF CONSENT DECREES ARE IRRELEVANT IN ASSESSING WHETHER AN EMPLOYER HAS A STRONG BASIS IN EVIDENCE FOR ENGAGING IN REMEDIAL EFFORTS TO RECTIFY PRIOR DISCRIMINATION.

Consent decrees have long played a vital role in the resolution of employment discrimination disputes. Consent decrees allow parties to fashion solutions that are most appropriate and tailored to their specific needs, while freeing judicial resources by removing complex cases from the trial dockets—thereby benefiting litigants, the public, and the federal courts. By pronouncing that consent decrees are irrelevant in determining the constitutionality of affirmative action measures, the decision below threatens to severly undermine their utility as a remedial tool. If employers cannot rely in later litigation on previously entered consent decrees and their litigation history as factors in establishing a "strong basis in evidence" for remedial action, there will be very little reason to enter those decrees at all.

The consent decree in this case, obtained by the DOJ, contained legal and factual underpinnings that strengthened the foundation of the City's remedial efforts. The Seventh Circuit majority, however, found the City's consent decree irrelevant both because the plaintiffs were not parties to it, *see Martin v. Wilks,* 490 U.S. 755 (1989), and because it contained no specific judicial findings that the particular remedies set forth in the decree were necessary to remedy prior discrimination and because it had not been subject to strict scrutiny when approved. *See* Pet. App. 6a-7a.

In disregarding the consent decree because of a lack of judicial findings, the Seventh Circuit has implicitly required that a decree must contain such findings before it may be considered in assessing an employer's basis for

engaging in affirmative action. This Court, however, has declined to require such a judicial determination, *see Wygant,* 476 U.S. at 289 (O'Connor, J., concurring in part and concurring in judgment);[8] *United Steelworkers v. Weber,* 443 U.S. 193 (1979), for good reason: such a requirement "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant,* 477 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment). Many local governments enter into consent decrees in large part to avoid judicial findings pertaining to liability. One important purpose of settlements, including consent decrees, is to avoid even the trial itself. "The parties would see little advantage in compromise if they were required to undergo a trial on the merits to obtain approval of the settlement . . . ." Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation,* 1983 U. Ill. L. Rev. 579, 586 (1983).

This Court has consistently emphasized that cooperative settlement is a valuable tool in civil rights litigation. *See, e.g., Johnson,* 480 U.S. at 630 & n.8; *Local 93,* 478 U.S. at 515 (citing cases). Settlement "acts as a lubricant for change. Structural reform can begin immediately and the likelihood of compliance is greater than if a coercive judicial decree is entered." Anderson, *supra,* at 580. Consent decrees provide a vital means for such reform particularly where, as here, a governmental bureaucracy is involved and resistance to judicially mandated efforts could impede progress. *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L.J. 897, 899.

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[8] As Justice O'Connor recognized in *Wygant,* "[a] violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed." *Wygant,* 476 U.S. at 289-90 (O'Connor, J., concurring in part and concurring in judgment).

As *amici* note above, the present case is particularly troubling because the defendant is a public employer whose actions serve as an example to the community at large and to private employers. "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 at 290 (O'Connor, J., concurring in part and concurring in judgment) (citations omitted) (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 364 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

In finding the City's consent decree wholly irrelevant to the strong basis in evidence determination, the Seventh Circuit also emphasized that the decree was entered into prior to *Croson*. Such a criticism effectively precludes any reliance on pre-*Croson* decrees. Yet the decree here remained in effect after *Croson*. *See* Pet. App. 38a. n.8. The City was therefore subject to a finding of contempt for violation of it. *See* 18 U.S.C. § 401; *Walker v. City of Birmingham*, 388 U.S. 307, 315-17 (1967). Moreover, as the Seventh Circuit panel opinion recognized, the decree was entered into "only after extensive litigation with the DOJ" and a "realistic" assessment by the City "that its policies violated the Constitution." Pet. App. 36a. The consent decree and its litigation history clearly are relevant factors in evaluating whether the City has established a strong basis for its remedial efforts, regardless of whether the decree was entered prior to *Croson*'s enunciation of the strict scrutiny standard.

In rejecting the consent decree, the Seventh Circuit has failed to recognize that both the United States and civil rights plaintiffs have traditionally sought decrees that go beyond merely requiring the defendant to cease its prior discriminatory practices, and instead require race- and gender-conscious affirmative action to redress prior discrimination. *See, e.g., Local 93*, 478 U.S. at 516-17.

Amici and other plaintiffs negotiate specifically to obtain such critical provisions, which are essential if an employer's work force is to begin to reflect the qualified work force in the population rather than the prior discriminatory practices. The Seventh Circuit has determined that such hard-fought bargains are meaningless.

Given that all decrees entered by district courts are subject to equal protection principles, *see, e.g., United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion), all employers, public and private, must worry about the implications of this decision. Employers attempting to satisfy consent decrees face severe consequences either way under the Seventh Circuit's approach—a finding of contempt if they violate the decree, or protracted litigation in which they cannot rely on that decree if they implement affirmative action pursuant to it that is later challenged. The cumulative effect of the Seventh Circuit's treatment of consent decrees may well be to eliminate employers' incentives to enter into consent decrees, even in the most egregious cases of discrimination, and to undermine significantly the utility of those decrees already in existence. This Court's review of such a radical rejection of the most common device used to settle discrimination cases is amply warranted.

CONCLUSION

For the reasons set forth above, *amici* request this Court to grant the petition for the writ of certiorari.

Respectfully submitted,

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August 18, 1993